NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

ADF, Inc., and its alter ego ADLA, LLC *and* International Brotherhood of Teamsters, Local Union No. 251. Case 1–CA–45068

February 26, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN ANDMEMBER SCHAUMBER

On November 4, 2009, Administrative Law Judge Arthur J. Amchan issued the attached decision. Anthony DelFarno, appearing pro se for the Respondents, filed exceptions in the form of a letter. The General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief to the Respondents' exceptions.

The National Labor Relations Board¹ has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.⁴

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Teamsters Local 523 v. NLRB, 590 F.3d 849 (10th Cir. 2009); Narricot Industries, L.P. v. NLRB, 587 F.3d 654 (4th Cir. 2009); Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

² The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondents' exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful review of the judge's decision and the entire record, we are satisfied that the Respondents' contentions are without merit.

³ In adopting the judge's alter ego finding, we find it unnecessary to pass on whether there is substantial identity of ownership based on the relationship of the unmarried cohabitating owners of ADF and ADLA, in light of the record evidence that ADF Owner Anthony DelFarno controls the overall operations and finances of ADLA. See, e.g., *Om*-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, ADF, Inc. and its alter ego ADLA, LLC, Pawtucket, Rhode Island, their agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. February 26, 2010

Wilma B. Liebman,

Chairman

nitest Inspection Services, 297 NLRB 752 (1990), enfd. 937 F.2d 112 (3d. Cir. 1991) (alter ego status found where the owner of the first entity owned only 20 percent of the second entity, but he effectively controlled the second entity's overall and daily operations); Rogers Cleaning Contractors, Inc., 277 NLRB 482, 488 (1985), enfd. 813 F.2d 795 (6th Cir. 1987) (alter ego status found where the first entity's sole owner dominated the second entity but held no ownership interest in it).

Further, in affirming the judge's decision to draw certain adverse inferences against the Respondents, Member Schaumber finds this case factually distinguishable from McAllister Towing & Transportation Co., 341 NLRB 394 (2004), a case in which he dissented in relevant part. Like the present case, McAllister Towing involved an administrative law judge's application of adverse inferences against an employer based on the employer's asserted noncompliance with subpoenas issued by the General Counsel. In Member Schaumber's view, however, the judge in McAllister Towing did not establish a sufficient record for the Board's review to substantiate her finding of noncompliance, or to justify the drawing of adverse inferences based on such noncompliance. In this case, by contrast, the judge created a detailed record of the Respondents' noncompliance and ruled on the appropriateness of sanctions only after: (1) considering the documents produced by Respondents at the hearing; and (2) allowing Respondents a full opportunity to explain their failure to substantially comply. In these circumstances, Member Schaumber finds that the judge's adverse inferences are supported by the record.

⁴ We shall amend the judge's recommended remedy to require that: (1) backpay resulting from the Respondents' failure to apply the collective-bargaining agreement to unit employees (other than Dennis Barr) shall be computed as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); and (2) the Respondents shall pay all contractually required fringe benefit fund contributions not paid since January 2009, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979), and make all unit employees whole for any expenses resulting from the failure to make such contributions, with interest, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

In his limited exceptions and supporting brief, the General Counsel seeks compound interest computed on a quarterly basis for any backpay or other monetary award. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Cardi Corp.*, 353 NLRB No. 97, slip op. at 1 fn. 2 (2009); *Rogers Corp.*, 344 NLRB 504, 504 (2005).

The General Counsel has also excepted to the judge's deferral of the issue of DelFarno's individual liability to the compliance stage of these proceedings. We note that matters of individual liability are routinely addressed during the compliance phase of unfair labor practice proceedings, and we find no merit in the General Counsel's exception.

Peter C. Schaumber,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Elizabeth A. Vorro, Esq., for the General Counsel.

Anthony DelFarno, pro se, of Pawtucket, Rhode Island, for the Respondents.

Elizabeth Wiens, Esq., (Gursky Law Associates), of North Kingston, Rhode Island, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Pawtucket and Providence, Rhode Island, on July 13, and August 24-25, 2009. Teamsters Local 251 filed the initial charge in this matter on November 21, 2008. The General Counsel issued his complaint on April 30, 2009.

The essence of this case is the General Counsel's allegation that ADF has repudiated its obligations under a collective-bargaining agreement with Local 251 by operating ADLA as an alter ego.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following²

FINDINGS OF FACT

I. JURISDICTION

ADF, a corporation, operated a flatbed trucking business with an office in Warwick, Rhode Island, at least until late 2008. Annually, ADF, at least through 2008, purchased and received goods within Rhode Island, valued in excess of

¹ [Certain errors in the transcript have been noted and corrected.]

Another example of the unreliability of DelFarno's testimony concerns ADLA's hiring of drivers. In his February 2009 affidavit, DelFarno denied that he played any role in hiring drivers for ADLA. The record of the instant hearing establishes that the statements in this regard in DelFarno's affidavit are false. (Tr. 174–176.)

Lisa Lavigne's testimony was often evasive and nonresponsive. Moreover, she failed to comply with the General Counsel's subpoena. In her March 2009 affidavit (Exh. R-4), Lavigne stated that ADLA paid ADF to pick up two trucks in New Jersey that ADLA had purchased. However, Lavigne failed to comply with the General Counsel's subpoena (G.C. Exh. 19), which required the production of whatever evidence she had of such payments. I thus draw the inference that the assertion in her affidavit, that ADLA paid ADF to pick up trucks for it, is false.

\$50,000 from points outside of Rhode Island. Annually, at least through December 31, 2008, ADF provided flatbed trucking services valued in excess of \$50,000 directly to entities that are directly engaged in interstate commerce. ADF admits and I find that in 2008 ADF was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union, Teamsters Local Union No. 251, is a labor organization within the meaning of Section 2(5) of the Act.

In 2008, ADLA, then located at the same address as ADF in Warwick, Rhode Island purchased six Freightliners tractors, valued at \$385,000 from Financial Federal Credit, Inc., of Teaneck, New Jersey and transported these trucks from New Jersey to Rhode Island.³ Three of these trucks are registered in the State of New Hampshire. ADLA subcontracts work to Ever Ready Trucking in Massachusetts. One of ADLA's principal customers, Capco Steel, with whom it has done \$150,000 in business, has a facility in New Haven, Connecticut. Capco is thus directly engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. ADLA also picks up concrete at Concrete Systems in Hudson, which is either located in Massachusetts or New Hampshire, Tr. 305.⁴ I find that ADLA is therefore an employer engaged in commerce within the meaning of the Act.⁵

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent ADF was incorporated in Rhode Island in 1990 to engage in the business of transportation of general commodities. Anthony DelFarno has been ADF's President and sole owner for many years. In 2008, ADF operated four flatbed trucks, black in color, primarily transporting steel and construction equipment. ADF's principal place of business was at 99 Jefferson Boulevard in Warwick, Rhode Island. At that location, ADF rented garage and office space from one of its principal customers, Cardi Corporation.

Prior to the fall of 2008, ADLA was a construction, demolition, and construction management company owned by Lisa Lavigne. Lavigne resides with DelFarno several times per week and is the mother of DelFarno's son, who was born in 2007

DelFarno is a manager and part owner of ADL (Tr. 95). He is also a supervisor and agent of ADLA within the meaning of Section 2(11) and (13) of the Act. ADF provided space to ADLA at its Warwick, Rhode Island location. ADLA did not pay rent to ADF for this space. Prior to January 1, 2009, Lavigne performed work for ADF, primarily making sales calls and doing some bookkeeping work.

² I decline to credit any of Respondent's self serving testimony. One example of the unreliability of Anthony DelFarno's testimony concerns the issue of his ownership interest in ADLA. In an affidavit given to the NLRB during its investigation of the charges in this matter, DelFarno stated that he was not an owner of ADLA and that he had no ownership interest in ADLA. (Tr. 218.) At the trial, DelFarno testified that he was "a part owner." (Tr. 95.) In his posttrial brief, he described himself as a 45-percent owner of ADLA, LLC.

³ ADLA also had the same telephone number as ADF in 2008.

⁴ There is no such place as Hudson, Rhode Island.

⁵ Thus, ADLA met the Board's jurisdictional standards in 2008 on the basis of direct inflow (the purchase of goods valued at more than \$50,000 from outside of Rhode Island) and on the basis of outflow in 2009, Siemons Mailing Service, 122 NLRB 81 (1958).

Moreover, to the extent that there is any ambiguity as to whether ADLA or ADF met the Board's jurisdictional standards, it is due to Respondents failure to comply with the General Counsel's subpoenas, such as par.18, which asked for detailed information regarding both companies' customers, including the dates and places of all work performed.

ADF, INC.

The principal employees of ADLA when it was a construction company appear to have been Lavigne's brothers. ADLA has not performed any construction or demolition work in calendar year 2009. There is no indication that ADLA performed any trucking work until late 2008 at the earliest. In 2009, however, ADLA's work has been almost exclusively providing trucking services to former customers of ADF. In February or March 2009, ADLA moved its garage to a location on Pine Street in Pawtucket, Rhode Island. Anthony DelFarno performs ADLA's administrative functions from this location and from his apartment in Cranston, Rhode Island, which he shares with Ms. Lavigne.

ADF had a bargaining relationship with Teamsters Local 251 for almost 20 years. In April 2008, ADF signed a collective-bargaining agreement with Local 251, which by its terms ran from April 15, 2008 until April 14, 2011. ADLA does not recognize Local 251 as the collective-bargaining representative of its drivers and has not complied and does not comply with ADF's collective-bargaining agreement with the Union.

By the terms of its collective-bargaining agreement with the Union, ADF was obligated to make payments to the Union's health services and insurance Plan. It ceased making these payments in July 2008. In 2008 ADF made none of the payments into the Union's pension fund that were required by the terms of the collective-bargaining agreement. Neither ADF nor ADLA currently make any contribution for health insurance for ADLA drivers nor does either company make any contribution to a pension plan for ADLA drivers. Another specific instance in which the General Counsel alleges that Respondents violated the Act is by laying off employee Dennis Barr in violation of the seniority provisions of the collective-bargaining agreement.⁶

A. ADF and ADLA are Alter Egos

In *Advance Electric*, 268 NLRB 1001, 1002 (1984), the Board set forth the standards to be applied in determining whether two presumably separate employers are alter egos: (a) the two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, supervision and ownership. The most important factor is centralized control of labor relations. *Superior Export Packing Co.*, 284 NLRB 1169, 1175 (1987); *J.M. Tanaka Construction v. NLR*B, 675 F.2d 1029, 1034 (9th Cir. 1982).

While the ownership of ADF and ADLA is not identical, the Board has not hesitated to find alter ego status even though entities had different owners, when the owners were in a close familial relationship, *Fallon-Williams, Inc.*, 336 NLRB 602 (2001). Although, DelFarno and Lavigne are not married, their relationship should be considered equivalent to that of husband and wife for purposes of determining whether ADF and ADLA are alter egos.⁷

Another factor, sometimes stated as "the crucial factor" in applying the alter ego doctrine, is a finding that the older company continued to maintain a substantial degree of control over the business claimed to have been sold to the new entity, *McAllister Bros.*, 278 NLRB 601, 616 (1986). As set forth below, ADF, in the person of Anthony DelFarno, has maintained complete control over the trucking business of ADLA.

Former Board Chairman Battista would have also required the General Counsel to prove an intent to avoid legal obligations under the Act in order to prove alter ego status. However, such intent has never been required by the Board as a necessary element to establish the existence of an alter ego relationship, e.g., SRC Painting, LLC, 346 NLRB 707, 720 (2006). In any event, I infer such a motive on the part of Anthony DelFarno in transferring his trucking operation from ADF to ADLA, see, e.g. DelFarno's testimony at Tr. 230. While DelFarno may have had other motives, such as obtaining affordable cargo insurance and workers compensation insurance, a significant incentive in making ADLA a trucking company was to cease compliance with the terms of his collective-bargaining agreement with Local 251.

Anthony DelFarno managed ADF. DelFarno, who is a part owner of ADLA, also manages that company. Lisa Lavigne may be the nominal owner of ADLA, but she plays little, if any, role in its management. She appears to be nothing more than an investor in ADLA's business. Lavigne does not know the names of ADLA's employees, including its drivers. She also does not know the names of ADLA's customers and does not review ADLA revenue documents.

DelFarno, rather than Lavigne prepares bids of work for ADLA. DelFarno, rather than Lavigne, signed the bill of sale for the six trucks ADLA purchased in October 2008. DelFarno maintains ADLA's check register and submitted ADLA's annual report to the State of Rhode Island in 2007 and 2009.

Similarly, DelFarno hired ADLA's truck drivers. Lisa Lavigne played no role in the hiring process. In fact, there is no evidence that any of the drivers have ever met Ms. Lavigne. DelFarno, rather than Lavigne, controls the labor relations of ADLA. ADLA drivers are directly supervised by Louis Volante, who supervised the drivers who worked for ADF. John Renzi who dispatched ADF drivers, is also the dispatcher for ADLA.

⁶ In his posttrial brief, the General Counsel informed the court that Dennis Barr died in October 2009.

⁷ This case is distinguishable from *US Reinforcing, Inc.*, 350 NLRB 404 (2007). In that case, the Board declined to find the "close familial relationship" the Board requires to overcome the absence of common ownership. DelFarno, unlike Christian Redmond, of US Reinforcing, has an ownership interest in ADLA. Moreover, Denise Herheim, the

owner of the alleged alter ego in US Reinforcing, appears to have exercised management functions in her company. There is no reliable evidence that Lisa Lavigne manages ADLA in any fashion.

⁸ ADF's mechanics prepared several of these trucks for service in late 2008.

⁹ I credit the testimony of Brian Priest, a current employee of ADLA, over the contrary testimony of Anthony DelFarno, and find that Louis Volante, was the drivers' supervisor for ADF and is currently the drivers' supervisor for ADLA. Board law recognizes that the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). The testimony of current employees that is adverse to their employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977).

From the standpoint of Respondent's drivers, little changed when ADLA became their nominal employer. However, former ADF employees no longer receive the benefits of ADF's collective-bargaining agreement with the Union and some drivers were switched to the newly purchased white trucks. When in late February 2009, an ADLA check made out to driver Javier Lopez was returned to him by the bank for insufficient funds, DelFarno paid Lopez the amount of the check in cash. This was the same procedure followed by ADF. 10

Since late 2008 or early 2009, ADLA has an identical business purpose as did ADF, the trucking of steel and cement products. In 2009 ADLA has not performed any construction or other non-trucking work. Until late March or early April 2009, ADLA operated out of the same facility on Jefferson Boulevard in Warwick, Rhode Island, as did ADF. At least some of its drivers punched the same timeclock that they had punched while working for ADF. Other than the fact that these drivers were no longer benefiting from the ADF'S collective-bargaining agreement with Local 251, the terms and conditions of their employment did not change at all when they became ADLA employees.

ADLA never paid rent to ADF, or apparently to anyone else, for the space it occupied at Jefferson Boulevard. ADLA does not have any customers for its trucking business that were not also trucking customers of ADF. One of ADLA's trucks, a black flatbed manufactured by Kenworth, is one of the trucks used by ADF for the same purpose. This truck is still registered in the name of Anthony DelFarno.

The other ADLA trucks, which are white in color, are engaged in the same business as those formerly used by ADF. They were transported from New Jersey to Rhode Island in October 2008 by drivers then employed by ADF. In sum, ADLA, as a trucking company, is merely a disguised continuance of ADF.

B. Individual Liability of Anthony DelFarno

The General Counsel moved at the hearing to amend his Complaint to allege the individual liability of Anthony Del-Farno. Respondent objects on the ground that the proposed amendment violates his due-process rights.

Whether the Board will pierce the corporate veil to hold an individual liable for corporate unfair labor practices is governed by the analysis set forth in *White Oak Coal Co.*, 318 NLRB 732 (1995), enfd. mem. 81 F.3d 150 (4th Cir. 1996). Under *White Oak*, the General Counsel must prove both parts of a two-prong test. Id. at 734. Under the first prong, the Board analyzes whether the corporation and the individual have failed to maintain their separate identities. Id. at 735. Under the second prong, the Board analyzes whether third parties may be damaged by this failure—that is, whether "adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." Id. This potential damage to

third parties includes "the diminished ability of the [corporation] to satisfy [its] statutory remedial obligations." Id. "The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form." Id. In order to satisfy the second prong, however, the individual alleged to be individually liable must have "participated in the fraud, injustice, or inequity." Id.

Anthony DelFarno resides in an apartment on Independence Way in Cranston, Rhode Island. He also maintains an office in that apartment. The rent and utilities for this apartment are paid out of ADLA accounts. DelFarno also makes court-ordered payments to his wife from ADLA accounts, Tr. 194-195. While he testified that at the end of each year he charges such payments to himself as income, DelFarno provided no documentary evidence to corroborate his testimony. Without such documentation, I do not find credible DelFarno's testimony that he accurately separates personal expenses from business expenses when using the ADLA accounts.

While the General Counsel has the discretion to litigate the issue of personal liability in the initial phase of an unfair labor practice proceeding, the judge has the discretion to defer this issue to the compliance stage of the litigation, *Dauman Pallet, Inc.*, 314 NLRB 185, 211–212 (1994). I will exercise that discretion to defer consideration of Mr. DelFarno's personal liability to the compliance stage for the following reasons:

Respondent appeared pro se.

Mr. DelFarno was notified of the General Counsel's intention to litigate his personal liability on August 10, 2009; two weeks before the resumption of the hearing.

DelFarno requested a continuance predicated upon the General Counsel's expressed intention to allege personal liability.

Respondent's request for a continuance was denied.

A clearer picture of the factors to be considered in applying the *White Oak Coal* criteria could be developed by enforcement of the General Counsel's subpoena in U.S. District Court. This is particularly true with regard to the issue of whether DelFarno's use of ADLA funds for his personal use has diminished ADLA's ability to satisfy its remedial obligations under the National Labor Relations Act. Thus, I have no sense of how DelFarno's use of ADLA accounts to pay rent, support for his ex-wife, etc. impacts the ability of ADLA to satisfy its obligations under the collective-bargaining agreement.

However, if the General Counsel obtains evidence that Respondents are transferring or misusing the assets of either ADF or ADLA, or both, to avoid satisfying their remedial obligations pursuant to my order in this matter, I will entertain a motion to reopen the record to address the issue of personal liability. This would include any evidence that assets are being transferred for such purposes to such entities as Highway Construction Services in which either Mr. DelFarno or Ms. Lavigne, or both, have a financial interest, G.C. Exh. 20.

¹⁰ A few weeks earlier Lopez received a check drawn on ADF's account which also was returned. DelFarno paid Lopez in cash on that occasion as well. When Lopez received this check, he was ostensibly working for ADLA. In late 2008, several of Lopez's check from ADF "bounced" and DelFarno then paid Lopez the amount of the checks in cash.

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C. Respondent's Failure to Comply with the General Counsel's Subpoenas

The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party, *McAllister Towing & Transportation Co.*, 341 NLRB 394 (2004).

On June 25, 2009, the General Counsel served upon Del-Farno and Lavigne subpoenas duces tecum ordering them to appear before this judge on July 13, 2009 with a number of documents. Paragraph 10 of the subpoena requested copies of leases or rental agreements entered into by or on behalf of ADF or DelFarno for real estate, machinery, equipment...or other property between January 1, 2007 and the present. On July 13, 2009, DelFarno testified that he leased two flatbed trucks to ADF. DelFarno also testified that there were leases from him to ADLA. The General Counsel asked DelFarno to provide these leases. He agreed to do so when the trial resumed but never did so.

Despite my order on July 13, 2009 that DelFarno fully comply with the General Counsel's subpoena no later than July 31, 2009, he produced very few additional documents prior to the resumption of the trial on August 24, 2009. On August 24, DelFarno introduced a court order evicting ADF from its premises at 99 Jefferson Boulevard, in Warwick, Rhode Island as of March 31, 2009. On August 24, DelFarno, for the first time, asserted that he was unable to produce additional documents because he had insufficient time to remove records from 99 Jefferson Boulevard prior to ADF's eviction. I do not find this credible.

Moreover, DelFarno had been on notice as to his obligation to preserve records to defend against the charge that ADF and ADLA were alter egos since service of the initial charge on November 28, 2008. DelFarno gave an affidavit to the General Counsel during the investigation of the charge on February 12, 2009, more than 6 weeks before he was required to move out of 99 Jefferson Boulevard. In sum, even assuming that DelFarno no longer had access to the records covered by the subpoena, this resulted from his own lack of due diligence.

Lisa Lavigne produced none of the documents requested in the subpoena issued to her and signed for by Anthony Del-Farno.

In light of the above, I draw the inference that either there were no leases of the trucks from DelFarno to ADF or ADLA, or between ADF and ADLA, or that the leases establish a lack of arms-length transactions between DelFarno and both companies and between ADF and ADLA. Due to Lavigne's failure to comply with her subpoena, I infer, for example, that ADLA did not pay ADF for the services of ADF's drivers in transporting ADLA's white trucks from New Jersey to Rhode Island, as Lavigne claimed at page of her March 19, 2009 affidavit, (R. Exh. 4).

D. The Termination of Dennis Barr's Employment¹²

Dennis Barr drove a truck for ADF for 8 years. On December 9, 2008, when he reported to work, ADF's dispatcher, John Rienzi, told Barr there was no work for him. A few weeks later, Anthony DelFarno told Barr he was being laid off. ADF continued to employ driver Brian Priest, who was junior to Barr in seniority, in violation of terms of ADF's collective-bargaining agreement with Local 251.

On January 5, 2009, Barr filed a grievance alleging violation of the seniority provisions of the collective-bargaining agreement. Anthony DelFarno responded to Barr on January 7, 2009. ¹³ In that letter DelFarno confirmed that he told Barr that he was being laid off. He then mentioned a confrontation Barr had with jobsite supervisor at Capco Steel in New Haven, Connecticut on June 3, 2008. DelFarno concluded his January 7, letter by stating:

I would like to change your separation with ADF INC from a layoff to a termination for gross insubordination. I will notify the Rhode Island Department for Unemployed Benefits of my decision.

[GC Exh. 3.]

In June 2008, DelFarno discussed the New Haven incident with Barr. DelFarno told Barr it could never happen again. Barr continued to drive flatbed trucks for ADF until December 9.

Barr applied for unemployment insurance sometime after December 9, 2008, and received unemployment insurance benefits for a while. Then his checks stopped. The Rhode Island Unemployment Insurance Agency informed Barr that ADF claimed that he had been terminated for cause. Eventually his benefits were resumed.

On the basis of this evidence, I conclude that Respondent laid off Barr in violation of the terms of its collective-bargaining agreement with the Union. It did not discharge Barr for cause.

CONCLUSIONS OF LAW

- 1. Respondents ADF, Inc. and ADLA, LLC are alter egos.
- 2. Respondents violated Section 8(a) (5) and (1) in repudiating and failing to comply with their collective-bargaining agreement with the Union.

REMEDY

Having found that the Respondents violated the Act, they shall be ordered to cease and desist and take certain affirmative

¹¹ Since March or April 2009, ADLA's trucks are dispatched from the Capco Steel yard on Pine St. in Pawtucket. DelFarno performs the business of ADLA from that location and from his residence on Independence Way in Cranston, Rhode Island.

¹² At pp. 34 and 43 of his brief, the General Counsel states that Respondents should be ordered to offer reinstatement to driver Javier Lopez, who quit his employment with ADLA in March 2009 (see Tr. 254–255). Thus it appears that the General Counsel is contending that Javier Lopez was constructively discharged due to Respondents' alleged failure to pay Lopez the compensation which it owed him. I decline to order Lopez' reinstatement because Respondents were not put on notice that the reasons that Lopez left its employment were at issue in this matter.

¹³ Barr testified that he did not receive the January 7, 2009 letter directly from DelFarno. He testified that he first saw it at the Local 251 union hall.

actions designed to effectuate the purposes and policies of the Act and post the appropriate notice.

It is recommended that Respondents rescind the withdrawal of recognition of the Union and continue in full force and effect the terms and conditions of the April 15, 2008 to April 14, 2011 labor agreement and apply them to its drivers. The Board does not require that employees suffer the loss of increases in wages or improvements in benefits or the addition of new benefits under circumstances such as these and I accordingly do not recommend that any increases in wages and improvements in benefits be rescinded. It is further recommended that Respondents make the employees whole for any loss of wages and benefits suffered because of the unfair labor practices, with interest.

The Respondent having terminated the employment of Dennis Barr in violation of the Act, must pay his estate for any loss of earnings and other benefits, computed on a quarterly basis from date of his termination to date of Dennis Barr's death, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent must also make employees whole for whatever earnings and other benefits were lost as a result of Respondent's failure to comply with the terms of its collective-bargaining agreement with the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondents, ADF, Inc. and its alter ego ADLA, LLC, Pawtucket, Rhode Island, their officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing to apply the terms and conditions of the April 15, 2008 to April 14, 2011 labor agreement between ADF, Inc. and the International Brotherhood of Teamsters, Local 251.
- (b) Withdrawing and/or repudiating its recognition of the Union as the exclusive collective-bargaining representative of Respondents' truck drivers.
- (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.
- 2. Respondents shall take the following affirmative actions necessary to effectuate the purposes of the Act.
- (a) Immediately recognize the Union as the exclusive collective-bargaining representative of the Respondent's drivers.
- (b) Comply with the terms and conditions of its 2008–2011 collective-bargaining agreement with the Union.
- (c) On request, bargain with the Union as the exclusive representative of its drivers concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.
- ¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (d) Make the unit employees whole for any loss of earnings and other benefits suffered as a result of the unfair labor practices in the manner set forth in the remedy section of the decision, including, but not limited to, reimbursement for any expenses resulting from Respondents' failure to make the required payments to the Union's fringe benefit funds.
- (e) Make the estate of Dennis Barr whole for the loss of wages and benefits resulting from ADF/ADLA's unlawful conduct.
- (f) Make all delinquent payments to the Union's fringe benefit funds.
- (g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (h) Within 14 days after service by the Region, post at its facility on Pine Street in Pawtucket, Rhode Island, copies of the attached notice marked "Appendix." 15 Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 9, 2008.
- (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C., November 4, 2009

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ADF, INC. 7

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activi-

WE WILL NOT fail to apply the terms and conditions of our 2008–2011 labor agreement with Local 251 of the International Brotherhood of Teamsters, "the Union," to our drivers.

WE WILL NOT unlawfully withdraw recognition from Local 251 of the International Brotherhood of Teamsters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately recognize the Union as the exclusive collective-bargaining representative of our drivers.

WE WILL make our drivers whole for any loss of earnings and other benefits suffered as a result of our failure to comply with our labor agreement, with interest. This includes reimbursing our drivers for any expenses resulting from our failure to pay required payments to the Union's fringe benefit funds.

WE WILL make the estate of Dennis Barr whole for any loss of earnings and benefits resulting from our unlawful termination of his employment on December 9, 2008.

WE WILL comply with the terms and conditions of the 2008–2011 collective-bargaining agreement with the International Brotherhood of Teamsters, Local 251.

WE WILL make all delinquent payments to the Union's fringe benefit funds.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment.

ADF, INC., AND ITS ALTER EGO ADLA, LLC